NA 02-0047-C H/H Patton v Novartis
Judge David F. Hamilton Signed on 07/25/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

TRACY PATTON,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 4:02-cv-00047-DFH-WGH
	)	
NOVARTIS CONSUMER HEALTH INC.,	)	
	)	
Defendant.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

TRACY L. PATTON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO. 4:02-cv-0047-DFH-WGH
	)	
NOVARTIS CONSUMER HEALTH, INC.,	)	
	)	
Defendant.	)	

ENTRY ON OBJECTION TO MAGISTRATE JUDGE'S DISCOVERY DECISION

The magistrate judge issued a written decision on December 13, 2004 denying defendant's motion to compel plaintiff to sign documents authorizing her treating physicians to talk privately with defense counsel. Defendant filed a timely objection to that ruling and seeks review under Rule 72(a) of the Federal Rules of Civil Procedure. For reasons explained below, the court finds that the magistrate judge's decision was contrary to law and must be set aside. The key reasons for this decision are set forth well in Magistrate Judge Hussmann's own thoughtful opinion in *Shots v. CSX Transportation, Inc.*, 887 F. Supp. 206 (S.D. Ind. 1995).

Plaintiff Tracy Patton alleges that she took Tavist-D, a drug manufactured by defendant Novartis Consumer Health, Inc., and that the drug caused her to suffer a stroke hours later. Patton's claims arise under state law. This court has jurisdiction by reason of diversity of citizenship. The case has been part of

Multidistrict Litigation 1407, *In re Phenylpropanolamine (PPA) Products Liability Action*, before Judge Barbara J. Rothstein of the Western District of Washington. The pretrial proceedings for this case in the MDL matter have been completed. The case was returned to this court for trial, which is scheduled for November 7, 2005.

In managing trial preparations for this specific case, the parties reached an impasse as to whether defense counsel should be entitled to talk privately with plaintiff's treating physicians. After thorough briefing, the magistrate judge followed the approach of the Indiana Court of Appeals in *Cua v. Morrison*, 626 N.E.2d 581 (Ind. App. 1993), *aff'd and adopted*, 636 N.E.2d 1248 (Ind. 1994), and held that private interviews of plaintiff's physicians should not be permitted. Novartis contends that Patton has waived the physician-patient privilege and that it should be entitled to have the legally unfettered access to these witnesses before trial that Patton has herself.

The broad legal framework for this issue is clear. State law supplies the rule of decision in this case. Accordingly, under Federal Rule of Evidence 501, "the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law." At the same time, matters of procedure in this federal civil action are governed by federal law. See *Hanna v. Plumer*, 380 U.S. 460 (1965) (federal rules governed service of process despite contrary state law).

The parties agree that plaintiff has waived her physician-patient privilege by filing this action and putting at issue her medical condition. See *Canfield v. Sandock*, 563 N.E.2d 526, 529-30 (Ind. 1990); *Collins v. Bair*, 268 N.E.2d 95, 101 (Ind. 1971). Such a waiver applies only to "those matters causally and historically related to the condition put in issue *and which have a direct medical relevance to the claim, counterclaim, or defense made*." *Collins*, 268 N.E.2d at 101 (emphasis in original). There is no indication here of any medical conditions or treatments that would be irrelevant to plaintiff's claims. Plaintiff has signed blanket releases for all medical records. She has not attempted to impose any limit on those that can be released to the defendant.

In *Cua v. Morrison*, the Indiana Court of Appeals reversed a trial court decision allowing defense counsel to conduct private interviews with an injured plaintiff's physicians. The *Cua* court explained that the decision was "not about what information [defendant] may discover, rather, it is about how [defendant] may discover it." 626 N.E.2d at 583. The state court was most troubled by the prospect that private interviews could lead to disclosure of irrelevant information that would be potentially embarrassing or worse. *Id.* at 584. In the state court's view, having the patient's own attorney present would provide sufficient protection for the patient's privacy. The court recognized that its ruling would cause some inconvenience in litigation, but it deemed that inconvenience a worthwhile trade for greater protection of patient privacy:

> The relationship of patient to physician is a particularly intimate one. To the physician we bare our bodies and or psyches. We do that in confidence that what is seen and heard will remain unknown to others. The protection of that confidential relationship is worth some inconvenience to the legal process.

Id. at 586.

In *Shots v. CSX Transportation*, Magistrate Judge Hussmann held that the *Cua* rule was a state rule of procedure that did not control discovery in a federal civil case. *Shots*, like this case, presented claims arising under Indiana law so that Indiana law governed whether the plaintiff had waived the physician-patient privilege. 887 F. Supp. at 207. Because the plaintiff had put his physical condition at issue, he had waived the privilege as to any relevant medical conditions. Magistrate Judge Hussmann concluded that *Cua* regulated only the procedure for discovering information that was no longer privileged, and that federal law governed such matters of procedure. *Id.* This court agrees.

The court in *Shots* concluded that the Federal Rules of Civil Procedure gave the court discretion to decide the question in either direction. In *Shots* itself, where the plaintiff had not indicated there were any irrelevant medical conditions, the court held that private interviews of physicians by defense counsel would be permissible. *Id.* at 208. The court left open the possibility of prohibiting such conversations in another case where there was irrelevant but sensitive medical information. Magistrate Judge Shields reached the same result in *Eve v. Sandoz*

Pharmaceuticals Corp., 2002 WL 32153352, *1 (S.D. Ind. May 16, 2002) (District Judge Young's entry affirming order). Magistrate Judge Baker followed *Shots* to reach the same conclusion, though without the benefit of a brief opposing such interviews, in *Everhart v. National Passenger R.R. Corp.*, 2003 WL 83569, *1 (S.D. Ind. Jan. 9, 2003).

The court believes that *Shots*, *Eve*, and *Everhart* were well reasoned and reached the correct results on the legal issue. In general, no party has exclusive rights to a witness. Counsel are entitled and expected to look for witnesses and to interview them. Their interviews constitute the paradigm attorney work product. See *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947). The reasoning of *Shots*, *Eve*, and *Everhart* applies to this case. Plaintiff is complaining of comprehensive and permanent injuries. There is no indication of any sensitive medical condition that would not be relevant here. Moreover, the transferee judge in the MDL proceeding imposed limits on the number of depositions that could be taken. As a result, defendant did not have an opportunity to depose all of plaintiff's physicians who may be testifying at trial. An informal interview may provide the best available substitute for such a deposition to prepare for trial.

In reaching the opposite result in this case, the magistrate judge did not identify any case-specific considerations that would distinguish the case from its predecessors in this district. The magistrate judge's opinion distinguished *Shots* on the ground that it was an FELA case under federal jurisdiction. However, the

Shots opinion states clearly that the case arose under diversity jurisdiction and was governed by Indiana substantive law. See 887 F. Supp. at 207.

The magistrate judge in this case also opined that "the strong policy of comity between state and federal sovereignties requires the federal district court to recognize state privilege where it can be accomplished at no substantial cost to federal substantive and procedural policy," citing *Memorial Hospital for McHenry County v. Shadur*, 664 F.2d 1058, 1061 (7th Cir. 1981). The magistrate judge further reasoned that the federal court, in recognizing the state privilege, must consider both the substantive privilege and the procedural protections the state has established to enforce the privilege: "State courts in Indiana have taken a strict view on how information may be discovered from the physician, and the state court ordered and defined procedural protection is sufficiently a part of the substantive privilege in Indiana to be recognized in this Court." Order of December 13, 2004 at 9.

This reasoning is not persuasive. It is contrary to law and has the effect of limiting substantially one party's, and only one party's, ability to prepare for trial by interviewing witnesses. In the *Shadur* case, federal law provided the rule of decision and governed the substance of the claimed privilege. The Seventh Circuit explained that in deciding such issues under federal law, comity should lead the federal courts to respect the state privilege. 664 F.2d at 1061. There is no issue

of that type here, however. The parties agree that plaintiff Patton has waived the physician-patient privilege.

In essence, then, the magistrate judge's reasoning erroneously defers to the state courts on matters of procedure in this federal civil case. "One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts by getting away from local rules." *Hanna v. Plumer*, 380 U.S. at 472, quoting *Lumbermen's Mutual Casualty Co. v. Wright*, 322 F.2d 759, 764 (5th Cir. 1963); see also *Park v. City of Chicago*, 297 F.3d 606, 611 (7th Cir. 2002) (affirming application of federal law of discovery and evidence to address federal defendant's failure to comply with state law governing retention of public records). Accordingly, the court finds that the magistrate judge's decision here was contrary to law and must be set aside under Rule 72(a) of the Federal Rules of Civil Procedure.

In defending the magistrate judge's decision, plaintiff argues that no Federal Rule of Civil Procedure directly governs the issue of private interviews with witnesses, so that it is reasonable to look to Indiana law on the question. There is no specific rule on the subject because there is no general or specific federal prohibition on attorney interviews with potential witnesses. Instead, the right to conduct such interviews is taken for granted as a matter of federal procedure. As *Hickman v. Taylor* explained, an attorney is entitled to conduct such witness interviews (or at least to try to do so) without opposing counsel being present.

329 U.S. at 511-12.[1] And *Hickman v. Taylor* also shows that this right to interview witnesses is deeply embedded in the Federal Rules of Civil Procedure. See *id.* Accordingly, the ground rules for witness interviews are essentially procedural in character and thus are governed by federal law.

These general principles of law are well-established. The key considerations were stated well by Judge Jackson of the District of Columbia in rejecting a plaintiffs' argument that the defendant should be permitted to talk with their physicians only in depositions:

> As a general proposition, however, no party to litigation has anything resembling a proprietary right to any witness's evidence. Absent a privilege no party is entitled to restrict an opponent's access to a witness, however partial or important to him, by insisting upon some notion of allegiance. *See International Business Machines Corp. v. Edelstein*, 526 F.2d 37, 41-44 (2d Cir. 1975); *Gregory v. United States*, 369 F.2d 185, 187-88 (D.C.Cir. 1966); *Edmund J. Flynn Co. v. LaVay*, 431 A.2d 543, 551 (D.C. 1981); 8 J. Wigmore, Evidence § 2192 (McNaughton rev. ed. 1961). Even an expert whose knowledge has been purchased cannot be silenced by the party who is paying him on that ground alone. Unless impeded by privilege an adversary may inquire, in advance of trial, by any lawful manner to learn what any witness knows if other appropriate conditions the witness alone may impose are satisfied, e.g., compensation for his time and expertise or payment of reasonable expenses involved, and while the Federal Rules of Civil Procedure have provided certain specific formal methods of acquiring evidence from recalcitrant sources by compulsion, they have never been thought to preclude the use of such venerable, if informal, discovery techniques as the *ex parte* interview of a witness who is willing to speak. *Hickman v. Taylor*,

[1]In fact, where only one side has access to a witness, that fact can support a finding of extraordinary need that would justify a court order that one side produce written statements and other non-opinion work product in discovery. See *Hickman v. Taylor*, 329 U.S. at 511 ("And production might be justified where the witnesses are no longer available or can be reached only with difficulty.").

> 329 U.S. 495 (1947); see *International Business Machines Corp. v. Edelstein*, 526 F.2d at 43-44; *cf. Gregory v. United States*, 369 F.2d at 187-88; *Trans-World Investments v. Drobny*, 554 P.2d 1148, 1151-52 (Alaska 1976).
>
> The potential for influencing trial testimony is inherent in every contact between a prospective witness and an interlocutor, formal or informal, and what a litigant may justifiably fear is an attempt by an adversary at *improper* influence for which there are sanctions enough if it occurs. *See Gregory v. United States*, 369 F.2d at 188. And there are entirely respectable reasons for conducting discovery by interview *vice* deposition: it is less costly and less likely to entail logistical or scheduling problems; it is conducive to spontaneity and candor in a way depositions can never be; and it is a cost-efficient means of eliminating non-essential witnesses from the list completely. Those are the reasons offered by defendant for what it would do here but cannot for the physicians' inhibitions deriving from the privilege of which plaintiffs are unwilling to relieve them except at deposition.

Doe v. Eli Lilly & Co., 99 F.R.D. 126, 128 (D.D.C. 1983) (emphasis in original) (ordering personal injury plaintiff to execute written authority for physicians to talk privately with defense counsel).

The Second Circuit's opinion in *IBM v. Edelstein* also recognizes both these general principles and the enormous practical difference between talking with a witness informally and privately, and talking with the same witness on the record and/or with opposing counsel present. See 526 F.2d 37, 41-42 (2d Cir. 1975) (granting writ of mandamus to ensure defense counsel could interview witnesses informally prior to civil trial); see also *United States v. White*, 454 F.2d 435, 438-39 (7th Cir. 1971) ("witnesses to a crime are the property of neither the prosecution nor the defense and . . . both sides have an equal right and should have an equal opportunity to interview them"). Where an interview would not intrude on

privileged communication, the court does not have the authority to prohibit one side from talking to the witness privately and informally. *E.g.*, *Wharton v. Calderon*, 127 F.3d 1201, 1207 (9th Cir. 1997) (reversing district court order prohibiting one side from interviewing witnesses privately); *IBM v. Edelstein*, 526 F.2d at 41-44 (granting writ of mandamus to set aside similar order).

Plaintiff Patton also relies heavily on the broad discretion that federal courts have in supervising discovery. That discretion does not support a ruling, however, that allows one side unfettered and unsupervised access to important witnesses, yet prohibits such contact for the other side. None of these witnesses are represented by plaintiff's counsel. None of them have been retained as testifying or non-testifying experts. Plaintiff argues that Novartis should be required to show some specific need for private interviews. Novartis has not shown such a particularized need, but none is necessary. This is a matter of fairness and symmetry. Neither side owns these witnesses. Each side is free to contact them and to talk with them privately. The witnesses are free to make their own decisions about whether they will meet with anyone, and if so on what conditions.

Plaintiffs have pointed out that some courts have optimistically suggested that opposing counsel should agree to talk with witnesses together. See *Cua*, 626 N.E.2d at 586 ("Cooperative counsel can arrange meetings between the physician and counsel for both sides. That is hardly more of a burden than the arrangement of a meeting between the physician and counsel for one side only.");

Shots, 887 F. Supp. at 208 ("we likewise encourage counsel to offer to opposing counsel the opportunity to be present when informal communications take place"). If counsel were cooperating on these matters, of course, the court would not need to step in and make a decision. Also, the court notes the Second Circuit's observation about experience in the *IBM* case, where the district court order requiring that counsel for both side be present proved to be "quite unworkable." The court explained:

> IBM found it difficult to arrange interviews with witnesses, usually corporate executives with offices outside New York City, at times and places which were convenient to both the witnesses and opposing counsel. Moreover, interviews in the presence of opposing counsel did not lend themselves to the free and open discussion which IBM sought. Interviews transcribed by court reporters were a most unattractive alternative.

526 F.2d at 41 (granting writ of mandamus).

Defendant's legal entitlement to talk with physicians may or may not have much practical effect here. The physicians are not required to agree to such interviews. If they do agree, they are free to draw any boundaries they wish in terms of time, place, and subject matter. Plaintiff is not free, however, to threaten physicians by suggesting that they would violate the law by talking with defense counsel. If the need arises, the court would probably adopt Magistrate Judge Shields' solution from the *Eve* case of requiring plaintiff to send a letter to the physicians with a copy of this decision and stating that she consents to the interview.

For the foregoing reasons, the magistrate judge's denial of defendant's motion to compel plaintiff to consent in writing to private interviews of treating physicians by defense counsel is contrary to law and is hereby reversed. Plaintiff shall submit such consents to defense counsel no later than fourteen days after issuance of this decision.

So ordered.

Date: July 25, 2005

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

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